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No. 02-15

In the Supreme Court of the United States

GREGORY P. SHELTON, SHELTON WHOLESALE, INC., POLARIS FIREWORKS, INC., AND NATIONAL FIREWORKS ASSOCIATION, LTD., PETITIONERS

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether common fireworks are subject to the jurisdiction of the Consumer Product Safety Commission under the plain language of the Federal Hazardous Substances Act, 15 U.S.C. 1261(q)(1)(B).

2. Whether the district court abused its discretion in denying the corporate petitioners' request for relief from their waiver of a jury trial under Federal Rule of Civil Procedure 39(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 277 F.3d 998. The district court's memorandum and order of April 28, 1998 (Pet. App. 84a-117a) is unreported, but available at 1998 WL 251273. The district court's order of May 1, 1998 (Pet. App. 82a-83a) is unreported. The district court's memorandum and order of January 6, 1999 (Pet. App. 36a-79a) is reported at 34 F. Supp. 2d 1147. The district court's memorandum and order of September 21, 1999 (Pet. App. 26a-35a) is unreported, but available at 1999 WL 825483. The district court's final judgment and order of January 30, 2001 (Pet. App. 24a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2002. A petition for rehearing was denied on March 29, 2002 (Pet. App. 23a). The petition for a writ of certiorari was filed on June 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States sued petitioners Shelton Wholesale, Inc., and Polaris Fireworks, Inc. (corporate petitioners), alleging they had imported fireworks that failed to comply with the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261 *et seq.*, and implementing regulations. Pet. App. 3a. Gregory P. Shelton, Shelton Wholesale, Polaris Fireworks, and the National Fireworks Association, Ltd. then sued the United States Consumer Product Safety Commission (CPSC or Commission), seeking declaratory and injunctive relief claiming that the Commission lacked jurisdiction under the FHSA to regulate "common fireworks."[1] After a joint bench trial of both cases, the district court held that the Commission has jurisdiction to regulate common fireworks, held that Shelton Wholesale had imported banned hazardous substances under the FHSA and assessed a $100,000 fine against it, and enjoined Shelton Wholesale, Polaris Fireworks, and Gregory P. Shelton from importing products that

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[1] Common fireworks, also known as "Class C" fireworks or "consumer fireworks," are firework devices designed to produce visible or audible effects by combustion. All of the fireworks at issue in this case were common fireworks (*e.g.*, toy paper caps, cone fountains, cylinder fountains, whistles without report, and sparklers).

violated the FHSA or CPSC regulations. The court of appeals affirmed.

1. Petitioners Shelton Wholesale, Inc. and Polaris Fireworks, Inc., are Missouri corporations that import and distribute fireworks manufactured in China. Petitioner Gregory P. Shelton is president and owner of both corporations. Pet. App. 2a. In October 1996, the United States brought suit against Shelton Wholesale and Polaris Fireworks, alleging they had violated the FHSA and implementing regulations by introducing into the channels of interstate commerce fireworks that were "banned hazardous substances" that failed to comply with the CPSC regulations. The complaint sought civil penalties and injunctive relief. *Id.* at 3a. In November 1996, the government amended its complaint to reduce the number of violations charged and to provide more specific information about which regulations each product violated. The corporate petitioners filed an answer but did not request a jury trial. In May 1997, with leave of court, the United States filed a second amended complaint adding as a defendant petitioner Shelton, but not changing the allegations against the corporations. In early June 1997, the government contended that the corporate petitioners had waived jury trial by failure to file a timely jury demand. See Gov't C.A. App. 7 para. 9 (scheduling order); *id.* at 8. Two days later, all defendants answered the second amended complaint and, for the first time, demanded a jury trial. Pet. App. 3a; C.A. App. 138.

In February 1997, while the government's enforcement action was pending, petitioners Gregory Shelton, Shelton Wholesale, Inc., and the National Fireworks Association, Ltd., an industry trade association, brought suit against the CPSC alleging that it had

no jurisdiction over common fireworks such as those at issue in this case and challenging aspects of the CPSC fireworks-testing program. Petitioners sought declaratory and injunctive relief. Pet. App. 85a-86a.

2. In April 1998, the district court granted the government partial summary judgment in both cases, holding, among other things, that the CPSC has authority under the FHSA to regulate common fireworks. Pet. App. 93a-95a. In construing the reach of the FHSA, the court examined the statutory definition of the term "banned hazardous substance," which provides in pertinent part:

> The term "banned hazardous substance" means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Commission by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce: *Provided*, That the Commission, by regulation, * * * (ii) shall exempt from clause (A), and provide for the labeling of, common fireworks (including toy paper caps, cone fountains,

> cylinder fountains, whistles without report, and sparklers) to the extent that it determines that such articles can be adequately labeled to protect the purchasers and users thereof.

15 U.S.C. 1261(q)(1); see Pet. App. 93a-94a.

Relying on the proviso to Section 1261(q)(1), petitioners argued that the FHSA exempts from regulation common fireworks that can be labeled adequately to protect consumers. Pet. App. 94a. The court rejected that argument, noting that the statutory exemption related solely to the automatic ban provision in Clause A. *Ibid.* The court explained that "[j]ust because Congress opted to exempt common fireworks from the automatic ban provision in Clause A does not mean * * * that Congress also intended to prohibit all governmental regulation of common fireworks." *Ibid.* To the contrary, the court observed, "Clause B permits the CPSC to conclude that, notwithstanding cautionary labeling, the degree or nature of a hazard is such that the public health and safety requires that the product be kept out of the channels of interstate commerce." *Ibid.* The court therefore concluded that the CPSC possessed jurisdiction to regulate common fireworks pursuant to Clause B of Section 1261(q)(1). *Id.* at 95a.

In accordance with the district court's scheduling orders, see Gov't C.A. App. 10 para. 6; *id.* at 23, the parties submitted briefs in April 1998 on the government's claim that petitioners had waived jury trial. In May 1998, the court ruled that the corporate petitioners were not entitled to a jury trial because they had not made a timely jury trial demand. Pet. App. 82a-83a. Because petitioner Gregory Shelton had timely invoked his right to a jury trial after the government added him as a defendant, the court

severed the government's claims against him and set that case for jury trial at a later date. *Ibid.* In May 1998, the court conducted a joint bench trial of both the government's enforcement action against the corporate petitioners and petitioners' suit against the CPSC. *Id.* at 39a.

In January 1999, the court ruled in favor of the government, finding, among other things, that the fireworks in question were banned hazardous substances under the FHSA. The court assessed a $100,000 fine against petitioner Shelton Wholesale for knowingly importing as many as ten of the 19 products at issue in violation of the FHSA. The court also enjoined the corporate petitioners from knowingly or recklessly importing products that violate the FHSA or CPSC regulations. Pet. App. 6a-7a, 36a-79a. In September 1999, the district court granted the government partial summary judgment against petitioner Gregory Shelton, enjoining him from knowingly or recklessly importing products that violated the FHSA or CPSC regulations. *Id.* at 7a, 34a. Subsequently, the government declined to pursue any civil penalty against Shelton individually, and final judgment was entered on January 30, 2001. *Id.* at 24a-25a.

3. The court of appeals consolidated the two cases for appeal (Pet. App. 7a) and affirmed.

a. The court first rejected petitioners' claim that the FHSA does not confer the CPSC jurisdiction over common fireworks, basing its determination "on the plain meaning of the statute." Pet. App. 9a. The court called "erroneous[]" (*id.* at 10a) petitioners' contention that adequately labeled common fireworks are exempt from classification as banned hazardous substances under Clause A of Section 1261(q)(1), holding that it was "clear from the plain language of the statute that

Congress intended Clause A and Clause B to serve two different purposes." Pet. App. 10a. As the court explained:

> Clause A, on its face and through subsection (ii) of the proviso, expressly bans hazardous products that are intended solely for use by children unless those products can be adequately labeled. Therefore, any hazardous products that are not intended solely for use by children, and products that are adequately labeled, are not governed by Clause A. That does not mean that such hazardous products are immune from the jurisdiction of the CPSC—only that they cannot be banned pursuant to that particular clause. Clause B serves the more general purpose of banning hazardous substances regardless of whether they are intended for children or adults, and "notwithstanding . . . cautionary labeling." 15 U.S.C. § 1261(q)(1)(B).

Ibid. The court emphasized that "[t]he plain reading of the statute leaves no other plausible interpretation." *Id.* at 12a. Thus, the court concluded that the district court had properly held that petitioners' "fireworks were subject to Clause B of the FHSA and to the jurisdiction of the CPSC." *Id.* at 13a.

The court of appeals also rejected petitioners' contention that Clause B could not pertain to common fireworks because they are meant for outdoor use, and therefore were not intended to be used (as Clause B specifies) "in households." Pet. App. 12a n.4; see 15 U.S.C. 1261(q)(1)(B). The court again relied on the plain language of the statute, noting that "the FHSA makes no such distinction" between indoor and outdoor use. Pet. App. 12a-13a n.4. The court also noted that a CPSC regulation defining "[h]azardous substances

intended, or packaged in a form suitable, for use in the household" "precisely refutes" (*id.* at 13a n.4) that contention by defining any hazardous substance to include those that "may be brought into *or around* a house, apartment, or other place where people dwell." *Ibid.* (quoting 16 C.F.R. 1500.3(c)(10)(i) (emphasis added)).

b. The court also rejected Shelton Wholesale and Polaris Fireworks' claim that the district court had abused its discretion in denying their demand for a jury trial, agreeing with the district court that while Gregory Shelton individually "had the right to a jury [trial] arising out of the second amended complaint, * * * the other parties to the action did not." Pet. App. 21a. The court concluded that the corporate petitioners had "waived their right to a jury trial by not demanding a jury trial within the required time period after the [government's] first amended complaint" (*ibid.*), and the demand in their answer to the government's second amendment complaint was insufficient because the second amended complaint merely added Shelton as an individual defendant and "contained no new triable issues that pertained to them." *Ibid.* The court held that the district court had not abused its discretion in declining to grant the corporate petitioners' request for relief from their waiver of jury trial under Federal Rule of Civil Procedure 39(b) because petitioners had "offered no justification for their failure to timely demand a jury trial." *Ibid.* (citing *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.), cert. denied, 445 U.S. 945 (1980)).[2]

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[2] The Court also rejected petitioners' claims that the CPSC failed to provide adequate procedures before refusing Customs

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners argue that the court of appeals improperly deferred to the CPSC's interpretation of its own jurisdiction under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. 13. Petitioners claim that the courts of appeals are in "deep conflict and disarray" on the appropriateness of deferring to an agency's interpretation of its own jurisdiction (Pet. 5), and contend that "[t]he Eighth Circuit's decision to grant complete deference to the Commission's view of its own jurisdiction ignores fundamental limitations on the *Chevron* doctrine." Pet. 13.

Petitioners are incorrect about the nature of the court of appeals' analysis. The court of appeals did not decide this case on the basis of *Chevron* deference to the administrative construction of an ambiguous statute. Instead, the court quite emphatically based its conclusion that the CPSC had jurisdiction to regulate common fireworks "on the plain meaning of the statute." Pet. App. 9a; *id.* at 10a (rejecting petitioners' argument based on "the plain language of the statute"); *id.* at 12a ("The plain reading of the statute leaves no other plausible interpretation."); see *id.* at 9a n.3 ("there is no ambiguity with respect to the relevant provisions in the FHSA"). As the court of appeals

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admission to the fireworks, and that the district court erred in admitting into evidence certain CPSC laboratory test reports. Pet. App. 13a-20a. Petitioners do not seek to revisit those claims here.

noted, resort to principles of deference is appropriate only where "congressional intent is not clear" from "the plain meaning of the statute." *Id.* at 8a. Where, as here, "the intent is clear, that is the end of the inquiry." *Ibid.* (citing *Chevron*, 467 U.S. at 842-843). Because the court did not reach the second step of the *Chevron* inquiry, the issue raised by petitioners is not implicated here.

Petitioners' sole basis for contending otherwise is the court of appeals' passing reference in a footnote to an FHSA implementing regulation defining "[h]azardous substances intended, or packaged in a form suitable, for use in the household." See Pet. 6 (citing Pet. App. 13a n.4); see generally 16 C.F.R. 1500.3(c)(10)(i). Petitioners had "suggest[ed]" (Pet. App. 12a n.4) that because 15 U.S.C. 1261(q)(1)(B) applies to "any hazardous substance intended, or packaged in a form suitable, for use in the household," it could not apply to common fireworks because they are intended for outdoor use. Pet. C.A. Br. 18. The court concluded that argument was "without merit" because the FHSA itself "makes no such distinction" between products used indoors and outdoors. Pet. App. 12a-13a n.4. It cited the regulation only as additional support for a conclusion it reached based on the language of the statute itself. *Ibid.* Many agency regulations confirm what the language of a statute itself provides. Judicial citation of such regulations does not convert a case from a *Chevron* step-one case into a step-two case. Because the court merely agreed with, rather than deferred to, the Commission's interpretation of Section 1261(q)(1)(B), its decision

raises none of the "deference" questions discussed in the petition (Pet. 5-16).[3]

2. Petitioners next argue that the court of appeals erred in affirming the district court's denial of the corporate petitioners' request for relief from their waiver of a jury trial. Pet. 16. Petitioners contend that the court of appeals' decision deviates from its own precedent (Pet. 22) and underscores an "irreconcilable conflict" among the circuits over the standards that should guide a district court's discretion in reviewing a jury trial request under Federal Rule of Civil Procedure 39(b). Pet. 16. The decision in this case is correct and does not conflict with the decision of any other court of appeals. Any difference in the courts of appeals' articulation of the governing standards is not implicated in this case. Accordingly, further review is not warranted.

Under Rule 39(b), a district court may "in its discretion upon motion" order a jury trial "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right." Fed. R. Civ. P. 39(b); see generally Fed. R. Civ. P. 38(b) and (d). In this case, the district court ruled (and petitioners do not now dispute, see Pet. 16) that the corporate petitioners waived their right to a jury trial when they failed to make a jury demand within the

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[3] Moreover, petitioners err in contending that an agency's interpretation of its statutory jurisdiction is not entitled to deference. See, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) (agency's interpretation of its jurisdiction is "due substantial deference"); *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984) ("We have never * * * held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review * * * ; indeed, we have not hesitated to defer").

required time period after service of the government's first amended complaint. Pet. App. 21a. Although petitioners did not file a Rule 39(b) motion seeking relief from the waiver,[4] they asked the district court to exercise its discretion under Rule 39(b) in response to a government motion seeking to cancel petitioners' untimely jury request.[5] C.A. App. 10; Gov't C.A. Br. 44. In holding that the district court had not abused its discretion in denying the corporate petitioners' request for a jury trial under Rule 39(b), the court of appeals noted that they had "offered no justification for their failure to timely demand a jury trial." Pet. App. 21a. That factbound decision is correct. Where, as here, a party offers no justification beyond inadvertence for its failure to make a timely jury demand, it is well within the district court's "broad" discretion to deny relief

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[4] Rule 39(b), by its terms, authorizes a district court to grant relief from a jury trial waiver only "upon motion." Fed. R. Civ. P. 39(b). Although some courts have held that asserting Rule 39(b) in response to a motion to cancel jury trial is sufficient to preserve the issue, *e.g.*, *EEOC* v. *Britrail Travel Int'l Corp.*, 129 F.R.D. 116, 117 (D.N.J. 1989), other courts, consistent with the Rule's plain language, have held that the request must be made "formally" by motion. *E.g.*, *Pyramid Co. of Holyoke* v. *Homeplace Stores Two, Inc.*, 175 F.R.D. 415, 420-421 (D. Mass. 1997).

[5] Although petitioners suggest that the government's filing of its motion to cancel jury trial was unduly tardy, see Pet. 22, its timing was determined by court scheduling order. See Gov't C.A. App. 10 para. 6; *id.* at 23. There is no issue here of unfair surprise. Petitioners had been on notice since at least June 9, 1997—two days before petitioners made their untimely jury request—that the government believed the corporations had waived their right to a jury trial (*id.* at 7 para. 9; *id.* at 8), and both the court and the parties characterized as unsettled the issue of whether the case would be tried to a jury. *Id.* at 7, 10, 15, 18, 23; Gov't C.A. Br. 46-47.

under Rule 39(b).[6] *BCCI Holdings (Luxembourg), S.A.* v. *Khalil*, 214 F.3d 168, 172 (D.C. Cir. 2000) ("a trial court is not required to grant a Rule 39(b) request based on nothing but inadvertence") (collecting authorities).

Although the courts of appeals have articulated the standard governing Rule 39(b) motions in varying ways, the divergence is relatively narrow and, in any event, immaterial to the outcome of this case. Some courts, including the court of appeals that decided this case, have stated that Rule 39(b) motions should be granted absent compelling reasons to deny them. See, *e.g.*, *Nissan Motor Corp. in U.S.A.* v. *Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (per curiam) ("absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial"); *Farias* v. *Bexar County Bd. of Trs.*, 925 F.2d 866, 873 (5th Cir.) (same), cert. denied, 502 U.S. 866 (1991); *Parrott* v. *Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983) (same), cert. denied, 464 U.S.

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[6] For the first time in this Court, petitioners allege that their failure to file a demand for jury trial in response to the complaint or first amended complaint was because "[t]he government's decision to add Shelton individually to the litigation altered the landscape of this litigation and, consequently, the strategic considerations for the Shelton parties." Pet. 21. However, petitioners do not explain how the addition of Shelton as a party could have "altered the landscape of this litigation" given that the district court severed Shelton's trial (Pet. App. 82a-83a), and the government did not pursue its action against him for fines. Such "generic argument[s]" (*Moody* v. *Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 208 (6th Cir. 1990)) are insufficient to show the district court abused its discretion. Cf. *Kitchen* v. *Chippewa Valley Schs.*, 825 F.2d 1004, 1013 (6th Cir. 1987) ("conclusory claims" of prejudice insufficient to support claim district court abused its discretion under Rule 39(b)).

936 (1983); *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.), cert. denied, 445 U.S. 945 (1980). Others have taken the position that such motions should be granted only when adequate and persuasive grounds have been shown. *E.g.*, *Pacific Fisheries Corp.* v. *HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1003 (9th Cir.) (trial courts have "narrow discretion to grant [Rule 39(b)] demand[s]" for jury trial), cert. denied, 122 S. Ct. 324 (2001); *General Tire & Rubber Co.* v. *Watkins*, 331 F.2d 192, 197 (4th Cir.) (court would be compelled to grant Rule 39(b) motion in "exceptional circumstances"), cert. denied, 377 U.S. 952 (1964).

However, variations in the formulation of the standard would not change the outcome in this case. Where, as here, no justification has been shown for the failure to make a timely request for a jury trial, the courts of appeals—including those courts that employ the more permissive standard petitioners advocate —agree that a court may deny relief. See, *e.g.*, *Pacific Fisheries Corp.*, 239 F.3d at 1003 (district court "did not abuse its discretion in denying the demand because counsel inadvertently missed the deadline"); *BCCI Holdings (Luxembourg), S.A.* v. *Khalil*, 214 F.3d at 172; *SEC* v. *Infinity Group Co.*, 212 F.3d 180, 195 (3d Cir. 2000) ("Courts in this Circuit generally deny relief when the only basis for such relief advanced by the requesting party is the inadvertence or oversight of counsel.") (citation and internal quotation marks omitted), cert. denied, 532 U.S. 905 (2001); *Burciaga*, 982 F.2d at 409 ("Consistent with th[e] guiding principle [that district courts should grant Rule 39(b) motions absent strong and compelling reasons to the contrary], we hold today that it would not be an abuse of discretion to deny relief pursuant to Rule 39(b) when

the failure to make a timely jury demand results from nothing more than the mere inadvertence of the moving party."); *Farias*, 925 F.2d at 873 ("It is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . when the failure to make a timely jury demand results from mere inadvertence on the part of the moving party.") (quoting *Bush* v. *Allstate Ins. Co.*, 425 F.2d 393, 396 (5th Cir.), cert. denied, 400 U.S. 833 (1970)) (ellipses in *Farias*); *Kitchen* v. *Chippewa Valley Schs.*, 825 F.2d 1004, 1013 (6th Cir. 1987) ("Generally, a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is 'mere inadvertence.'") (quoting *Misco, Inc.* v. *United States Steel Corp.*, 784 F.2d 198, 205 (6th Cir. 1986)); *Bellmore* v. *Mobil Oil Corp.*, 783 F.2d 300, 307 & n.9 (2d Cir. 1986) (not an abuse of discretion to deny a Rule 39(b) motion "when the failure to make a timely demand for a jury trial results from mere inadvertence") (quoting *Bush*, 425 F.2d at 396); *Parrott*, 707 F.2d at 1267 (if the failure to demand jury trial "is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion"). Petitioners have cited no case from any court of appeals—and we are aware of none—in which a district court was found to have abused its discretion in denying relief under Rule 39(b) where the moving party offered no explanation for its delay.

Moreover, the court below employed the more permissive standard petitioners advocate. The court of appeals in this case clearly relied on *Littlefield* v. *Fort Dodge Messenger*, *supra*, in which the Eighth Circuit held that "courts 'ought to approach each application under Rule 39(b) with an open mind,' and * * * jury trials ought to be liberally granted when no prejudice results." 614 F.2d at 585 (quoting 9 Charles A. Wright

& Arthur R. Miller, *Federal Practice and Procedure* § 2334, at 116 (1971)). See generally 8 James W. Moore et al., *Moore's Federal Practice* § 39.31[4][a], at 39-51 & n.18 (3d ed. 2002). Contrary to petitioners' suggestion (see Pet. 22), the decision of the court of appeals is in full accord with *Littlefield*, in which the court held that the district court had not abused its discretion in denying relief where the moving party had "offer[ed] no justification for the failure to make an appropriate demand other than inexperience, and * * * point[ed] to no prejudice resulting from denial." 614 F.2d at 585; see *Burciaga*, 982 F.2d at 409 (stating that denial of relief when delay of jury demand results from inadvertence is "[c]onsistent with th[e] guiding principle" that "absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial").

In any event, the fact that petitioners complain that the Eighth Circuit did not faithfully apply its own standard only underscores that the exact formulation employed by the court is not critical in evaluating these factbound discretionary determinations. And, of course, any conflict of authority within the Eighth Circuit would not merit this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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